COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 098496-88, 018210-89,065875-91, 006439-94, 053044-94**
Lawrence J. Robinson	Employee
E L. Harvey & Sons.	Employer
Commercial Union Ins. Co., Kemper Ins. Co., Peerless Ins. Co.	Multi-Insurer

REVIEWING BOARD DECISION

(Judges Maze-Rothstein, Carroll and Levine)

APPEARANCES

John F. Trefethen, Esq., for the Employee at hearing
James N. Ellis, Esq., for the Employee on brief
William J. McCarthy, Esq., for the Insurer, Kemper Ins. Co., at hearing
Matthew F. King, Esq., for the Insurer, Kemper Ins. Co., on brief
Leonard Y. Nason, Esq., for the Insurer, Peerless Ins. Co.
Edward B. McGrath, Esq., for the Insurer, Commercial Union Ins. Co.

MAZE-ROTHSTEIN, J. The employee appeals from a decision dismissing his claim for workers' compensation benefits attributable to deep venous thrombosis (blood clotting) in his left lower leg. He asserts error in the application of the rule in Zerofski's Case, 385 Mass. 590 (1982). We agree that the failure to address pivotal evidence regarding whether his employment as a truck driver involved "an identifiable condition that is not common or necessary to all or a great many occupations" was error. Id. at 595. For this reason, we recommit the case for further findings.

Mr. Robinson worked as a truck driver for the employer from 1979 until 1993. (Dec. 7-11; Tr. 14-15.) In 1979 he worked as a "yard man," which required him to drive a truck and pick up containers filled with materials. "On a busy day" he would spend up to half of his workday in the cab of his truck. (Dec. 9.) From 1980 through 1989 the

employee drove a "roll-off" truck up to five hours daily emptying dumpsters at various construction sites throughout the state. (Dec. 7, 9; Tr. 16.) As he drove the "roll off," there was evidence that he was jostled a good deal causing numerous minor traumas to his lower extremities. (Peerless Ins. Ex. 7.) From 1984 through 1989 he did this same job but drove most of the longer routes, as far as New Hampshire. (Dec. 7, 9; Tr. 17-18.)

In January 1988, the employee began to experience swelling and excruciating pain in his left calf. He remained out of work for several weeks and was diagnosed with blood clotting in his leg (deep venous thrombosis). (Dec. 9.) Thereafter, he returned to truck-driving. Id. In March 1989, Robinson had further left calf pain. He left work and filed a claim against Kemper, the insurer at the time, but returned to work three to four weeks later. (Dec. 10.) From 1990 to 1993 Robinson continued to do most of the longer routes but drove a "straight truck," which transported 96 gallon recycling carts. (Dec. 7.) His duties included lifting bins containing recycled paper and reduced driving with breaks every one to one and one half-hours. (Dec. 10; Tr. 23.) He continued to have calf problems while truck driving. (Dec. 10-11.) In 1993, after this truck driving job failed to provide the employee relief, Robinson was assigned to an even lighter duty job sorting "impurities" in a stationary position from a conveyor belt. (Dec. 12.) After two weeks, Robinson's employment was terminated. (Dec. 12.) He then filed claims against the subsequent insurers for the employer, Commercial Union and Peerless Insurance Companies. (Dec. 4-5.)

The course of the employee's treatment was extensive. Treating physicians generally agreed that the employee's deep venous thrombosis was causally related to his work as a truck driver. (Dec. 13-32.) Dr. Susan Moran opined that the prolonged sitting and repeated trauma to the calves that occurs when driving a heavy-duty vehicle were likely causative factors. (Dec. 14.) Dr. Richard Whitten agreed, on the basis that many patients develop deep venous thrombosis following long periods of travel with leg immobility. (Dec. 15.) Dr. John Hermann felt that, given the absence of any other inciting factor, probably prolonged sitting while truck driving was the cause. (Dec. 31.) Moreover, the Peerless Insurance Company's expert, Lawrence Baker, M.D., concurred

that with the negative history of any family propensity, drug use, or cigarette smoking, that truck driving, with prolonged periods of sitting in one position for an hour or two and minimal traumas to the lower extremities, probably caused the deep venous thrombosis. (Dec. 35-36; Peerless Ins. Ex. 7.)

After hearing the claims against the three insurers, the judge nonetheless concluded that the employee had failed to show by a preponderance of the evidence that his deep venous thrombosis arose out of and during the course of his employment. (Dec. 41.)

> While the Employee testified that in his driving jobs for the Employer there were times when he would be required to drive a maximum of five hours per day there is no credible evidence that this was a daily occurrence. In fact there is no evidence as to how often he would have to drive five hours in a day. By his own testimony the Employee would drive one to one and one–half hours at a time while doing the straight truck job.
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> As is the case with a great majority of people the Employee also engaged in situations of sitting for periods of time at home, while commuting to and from work or while eating at a restaurant, for example.
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> I find the medical diagnoses by exclusion of other causative factors for the Employee's deep venous thrombosis condition all seem to weigh heavily on the Employee's claimed prolonged daily driving activities. I find the Employee by his own testimony does not support a finding that his jobs for the Employer required regular periods of prolonged driving. While he testified that there were routes that may require up to five hours driving, I find there is no credible evidence to show how often he would be required to work those routes.
>
> I further find that continuous sitting of less than two hours duration is a common everyday activity that is performed frequently by individuals both on and off the job, and is necessary to a great many occupations and human activities.

(Dec. 41-43.) (Emphasis added.)

The judge therefore denied and dismissed the employee's claim. Aggrieved, the employee appeals to the reviewing board. The employee contends that the judge misapplied the principles of law set out in Zerofski's Case, supra. In that case, the court stated the now well-known proposition:

> To be compensable, the harm [covered by the act] must arise either from a specific incident or series of incidents at work or from an identifiable condition that is not common and necessary to all or a great many occupations. The injury need not be unique to the trade, and need not, of course, result from the fault of the employer. But it must . . . be identified with the employment.

Id. 594-595 (footnotes omitted).

The analysis of whether the employee's thrombosis was related to an "identifiable condition that is not common or necessary to all or a great many occupations" focuses too narrowly on prolonged daily sitting. First, none of the medical opinions summarized establish a requirement for *daily* prolonged driving in order to make out causal relationship. Further, the duration of "prolonged sitting" necessary to incite the condition in a heavy truck driving situation, according to Dr. Baker, was no more than one to two hours at a time.[1] More importantly, while prolonged sitting was an aspect of this employee's truck driving activities, there was also evidence of other leg stresses and traumas that according to the medical opinions probably contributed to his thrombotic condition. In his account of the employee's history, Dr. Baker reported that "the suspension system [on the truck] was poor and that he was jostled quite a bit within the seat area, and this caused minor traumata to his lower extremities." (Peerless Ins. Ex. 7.) This statement is not hearsay, as it is an extrajudicial statement of a *party opponent* to the insurer, and is treated as an admission with full evidentiary value. See Liacos, Massachusetts Evidence, § 8.8.1 (6th ed. 1994). Moreover, the statement was admitted

[1] Evidence regarding the duties while driving the "straight truck" from 1990 onward would have little bearing on compensability since the condition developed in 1988 and from 1989 onward the breaks in driving every one to two hours were based on a medical restriction for the leg condition. (Dec. 10, 36; Employee Ex. 12 and 16; Peerless Ins. Ex. 7.)

without objection, and therefore is entitled to full evidentiary value. Freyermuth v. Lutfy, 376 Mass. 612, 620, n. 8 (1978).

Thus, this case is unlike Smick v. South Central Mass. Rehabilitative Resources, Inc., 7 Mass. Workers' Comp. Rep. 84 (1993), where, in considering a bus driver's claim of a back injury aggravation allegedly attributable to her job duties, we stated:

> The facts as found in the present case are analogous to the facts in Zerofski and the line of decisions on which it is founded. The work-related activities the employee claims aggravated her back condition – sitting, driving, bending – are simply too common and necessary to a number of occupations to constitute identifiable conditions of employment subject to the Act. No evidence was presented that the bucket seat in which the employee sat to drive was in any way defective or otherwise different from the type of seat any number of employees in various jobs use on a daily basis, nor was the length of time the employee was required to remain seated between pick ups and drop offs unusual or uncommon. No other activity the employee had to perform as a driver, including opening and shutting the passenger door, placing a stool for the passengers' use, and assisting the passengers into and out of the van, was anything other than an activity common to a number of occupations.

Id. at 88.

In the present case, there was evidence that the employee's prolonged sitting in the cab of a truck was accompanied by "quite a bit" of "jostling" as he drove around to various construction sites loading dumpsters and picking up debris. (Peerless Ins. Ex. 7; Tr. 16.) This jostling resulted in repeated minor trauma to the employee's legs. (Peerless Ins. Ex.7.) The failure to address the foregoing evidence makes the case appropriate for recommittal. Certainly, such leg trauma, if credited, could be viewed as being "an identifiable condition that is not common and necessary to all or a great many occupations," and therefore compensable. Zerofski's Case, supra.

The case is recommitted. G.L.c. 152, § 11C.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Martine A. Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: January 26, 1999.